

ORIGINAL

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September 8, 1999

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street, SW
Room: TW-A325
Washington, DC 20554

RECEIVED

SEP 08 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: WT Docket No. 98-205

Dear Ms. Salas:

Today, the attached letter was delivered to Ari Fitzgerald, legal advisor to Chairman Kennard, regarding the Commission's review of its spectrum aggregation limits. Please include a copy of this ex parte communication in the record for the above captioned proceeding. If you have any questions, you may call me on (202) 336-7873.

A handwritten signature in black ink, appearing to read "D. Brittingham".

Attachment

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September 8, 1999

Mr. Ari Fitzgerald
Legal Advisor
Office of Chairman Kennard
Federal Communications Commission
445 12th Street, S.W., Room 8-B-201
Washington, D.C. 20554

Re: WT Docket 98-205; "Spectrum Cap"

Dear Mr. Fitzgerald:

In our meeting of September 2, 1999, you requested our views on the use of the Commission's waiver process as a means for allowing commercial mobile radio service (CMRS) providers to acquire spectrum above the 45 MHz CMRS spectrum cap. We are surprised and concerned that the Commission is considering such action in lieu of repealing this outdated and burdensome spectrum aggregation limit. As the Commission recognizes in its Fourth Annual Report, the CMRS market is highly competitive. The spectrum cap is no longer needed to promote competitive entry, since markets covering approximately 74% of the population have at least five mobile operators. Moreover, as representatives from Bell Atlantic Mobile (BAM) described in detail last week, the current limit will impede the development of Third Generation (3G) mobile and other advanced wireless services, and will undermine the efforts of the wireless industry to compete with landline telephone companies. For the reasons provided herein, we do not believe that the proposed waiver process is the right solution to the spectrum cap problem.

First, it would be difficult for the Commission to establish objective criteria that could be applied to waiver requests without resulting in considerable administrative delay. You suggested that one of the criteria that the Commission might consider is whether the carrier intends to provide services in competition with landline services. However, how would the Commission determine whether such competition exists? As we described in our meeting, many of BAM's customers are already using its mobile services in lieu of landline services in certain cases. We expect this competition to increase. However, if the Commission were to establish waiver criteria that only considered fixed wireless access services to be competitive with landline, then the proposed waiver process would not aid in the delivery of future mobile services, and thus, not serve the public interest.

Second, the proposed waiver process would invite some carriers to use this process as a forum to slow down their competitors. In doing so, it would put a severe strain on Commission time and resources and would likely delay the offering of new services that depend on the availability of additional spectrum. The considerable time required to conduct case-by-case reviews is one of the primary reasons given by the Commission for favoring a bright line rule over a market-by-market analysis.

Third, a grant of relief premised on a commitment to provide certain services seems to be a significant departure from the Commission's long-standing position that it should allow wireless services to develop in response to market forces. While BAM believes that wireless services, including high-speed data services, will develop in competition with services provided by LECs, the Commission should not dictate how the market evolves.

Finally, attempting to create a new set of waiver criteria is a course that the Commission has recently rejected in another context because of its bad experience with grants by waiver. The Commission had for several years applied a five-part waiver test to broadcasters seeking waivers of the "one-to-market" rule to acquire more stations (i.e., more spectrum). These waivers drew increasing criticism from Commissioner Tristani and others who argued that action by waiver generated uncertainty and allowed "gaming" of the system. In August, the Commission dropped the one-to-a-market waiver system in favor of a clear new rule. As Chairman Kennard stated, "these rule changes are long overdue. For far too long, it's been a case of administration by waiver, not by rule. Parties have presented us with a variety of business arrangements and combinations, and we have not been able to set a bright line test as to what's permitted and what's not, and so the problem just keeps getting worse". *Review of the Commission's Regulations Governing Television Broadcasting, Report and Order, MM Docket No. 91-221, FCC 99-209, released August 6, 1999, Separate Statement of Chairman William E. Kennard.* Bell Atlantic sees no basis for the Commission to go down a path of grant-by-waiver that it has already found is unworkable and unwise.

If the Commission is interested in granting greater flexibility under its waiver process, it might consider granting waivers to cellular carriers that are required to offer analog services. As we discussed, cellular carriers are required by the Commission's rules to provide analog service. This analog obligation prevents BAM from making the most efficient use of its spectrum allotments. In current cellular systems, approximately 70-80% of available spectrum is dedicated to analog customers. While digital conversion is progressing, a substantial amount of spectrum (10 MHz or more) is expected to be dedicated to analog for the foreseeable future. Consequently, 55 MHz of cellular/PCS spectrum is roughly equivalent to 45 MHz of PCS spectrum. If the Commission is concerned about competitors having access to equivalent shares of spectrum, it should provide flexibility under the cap for cellular carriers that are obligated to provide analog service.

Mr. Ari Fitzgerald, Office of Chairman Kennard

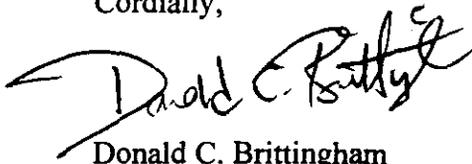
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We continue to urge the Commission to repeal the spectrum cap in its entirety. It is no longer necessary to promote wireless competition, and will impede the advancement of policies that the Commission has found to be in the public interest, i.e., wireless-landline competition and the development of advanced telecommunications services. Alternatively, the Commission should raise the cap to 55 MHz and commit to review the rule again in two years. This limited form of relief would give carriers like BAM the flexibility they need to deploy spectrum-intensive services in the near term.

If you have any questions, please me on (202) 336-7873.

Cordially,

A handwritten signature in black ink, appearing to read "Donald C. Brittingham". The signature is stylized with a large initial "D" and a long horizontal stroke extending to the left.

Donald C. Brittingham

cc: Kathy Brown
Bob Calaff
Adam Krinsky
Mark Schneider
Peter Tenhula
Tom Sugrue